

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No. 47 of 2005 (O&M)

Date of Decision: 18.1.2016

Mr. Surender Paul

....Appellant.

Versus

CIT, Chandigarh

...Respondent.

1. Whether the Reporters of the local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? **YES**
3. Whether the judgment should be reported in the Digest?

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MRS. JUSTICE RAJ RAHUL GARG.**

PRESENT: Mr. S.K. Mukhi, Advocate for the appellant.

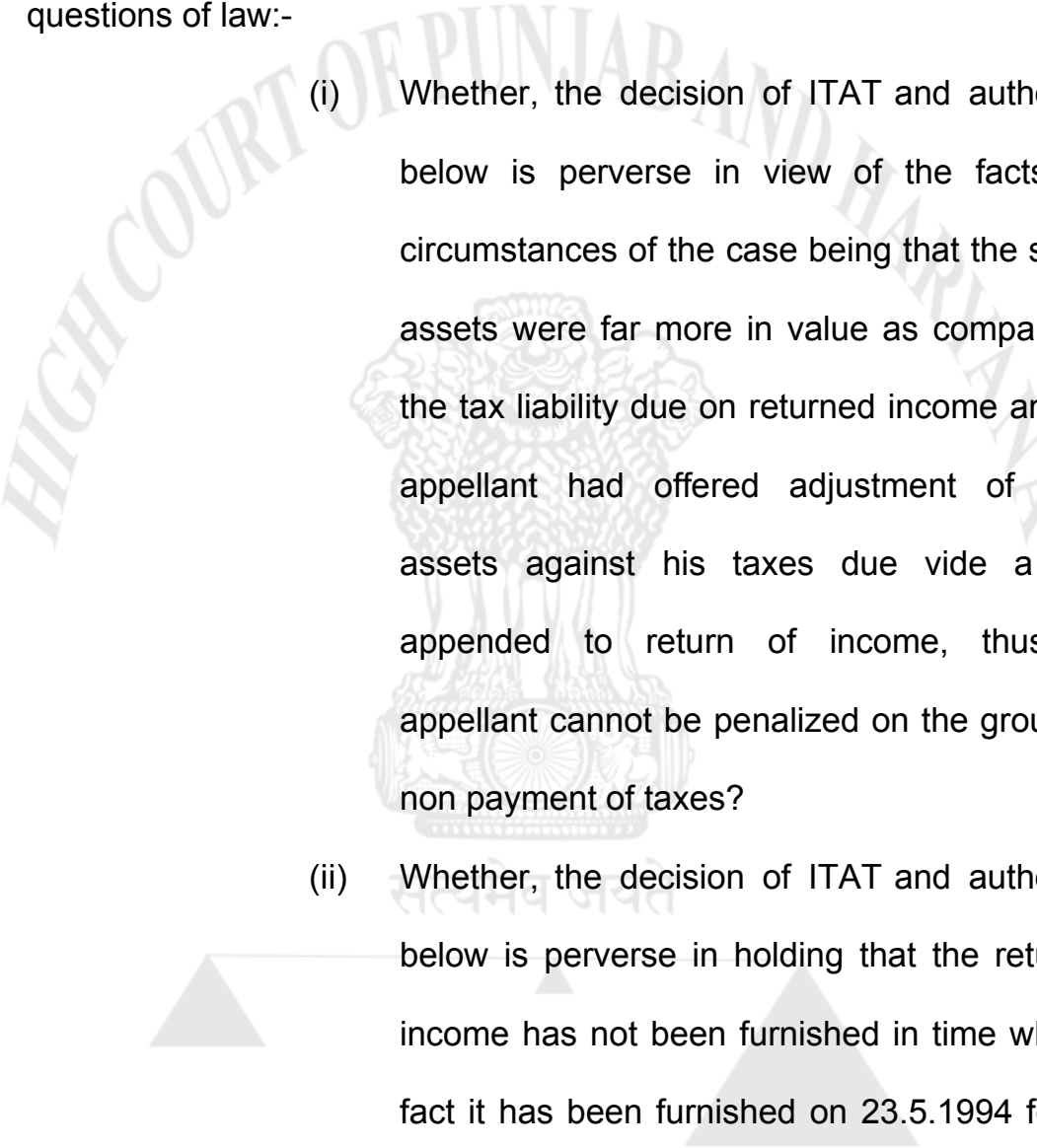
Ms. Urvashi Dhugga, Advocate for the respondent.

AJAY KUMAR MITTAL, J.

1. This order shall dispose of a bunch of three appeals bearing ITA Nos. 386 of 2004, 47 and 104 of 2005 as according to learned counsel for the parties, the identical questions of law and facts are involved therein. For brevity, the facts are being extracted from ITA No. 47 of 2005.

2. This appeal has been preferred by the assessee under Section 260A of the Income Tax Act, 1961 (in short "the Act") against the order dated 31.8.2004 (Annexure A-1) passed by the Income Tax

Appellate Tribunal, Chandigarh Bench "A", Chandigarh (hereinafter referred to as "the Tribunal") in ITA No. 494/CHD/2001 for the assessment year 1994-95. All the appeals were admitted by this Court vide order dated 9.5.2006 for consideration of the following substantial questions of law:-

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- (i) Whether, the decision of ITAT and authorities below is perverse in view of the facts and circumstances of the case being that the seized assets were far more in value as compared to the tax liability due on returned income and the appellant had offered adjustment of those assets against his taxes due vide a note appended to return of income, thus the appellant cannot be penalized on the ground of non payment of taxes?
 - (ii) Whether, the decision of ITAT and authorities below is perverse in holding that the return of income has not been furnished in time while in fact it has been furnished on 23.5.1994 for the A.Y. 1994-95?
 - (iii) Whether, on the facts and circumstances of the case the ITAT was justified in law that the return of income should have been filed by the appellant within time limit specified u/s 139(1) in order to get the benefit of explanation 5 of Section 271(1)(c) of the Income Tax Act, 1961?

3. A few facts necessary for adjudication of the instant appeal as narrated therein may be noticed. A search and seizure operation was carried out on 30.8.1993 by the Income Tax Department at the residential as well as business premises of the family of the assessee and cash, jewellery, FDR/IVPs and promissory notes were seized. During the course of search, a disclosure of ₹ 3 lacs was made under Section 132(4) of the Act. The said amount was surrendered subject to no penalty under Section 271(1)(c) of the Act. A further disclosure of ₹ 6 lacs was made in the hands of Shri Dipti Lal, Shri Raj Kumar, Dipti Lal and Sons besides ₹ 3 lacs in the case of Shri Surinder Pal (the appellant herein) for the assessment year 1994-95. The income tax return for the assessment year 1994-95 was filed by the assessee on 23.5.1994 declaring the income at ₹ 4,70,000/- inclusive of surrender under Section 132(4) of the Act. However, regarding the payment of taxes due thereon, a note was appended to the computation (Annexure P-3) to the effect that *"to be adjusted against seized liquid assets and also out of liquidation of other assets with my assistance."* The taxes on the returned income as per the assessee's own computation were:-

	<u>Assessment Years</u>	
	1993-94	1994-95
Shri Surinder Pal	₹ 1,71,498/-	₹ 2,05,837/-
Shri Raj Kumar	₹ 1,71,498/-	₹ 2,05,837/-
Shri Dipti Lal	₹ 83,278/-	₹ 1,31,884/-

The seizure of the assets was worth ₹ 26,01,584/- as against the taxes due amounting to ₹ 9,69,841/- on the basis of returns of income filed by all the family members. The assessment was finalized

vide order dated 27.12.1996 at a total income of ₹ 11,13,739/- by presuming the business of jewellery as a joint business of the father and two brothers. The said assessment order was set aside by the Commissioner of Income Tax (Appeals) [for brevity "the CIT(A)"] to be made *de novo*. Thereafter, the Assessing Officer vide order dated 31.1.2000 (Annexure A-2) framed the assessment accepting the returned/surrendered income at ₹ 4,70,000/-. The Deputy Commissioner of Income Tax, Investigation Circle 2(1), vide order dated 27.7.2000 (Annexure A-4) levied penalty of ₹ 1,87,040/- under Section 271(1)(c) of the Act for the assessment year 1994-95 on the amount disclosed under Section 132(4) read with Explanation 5 to Section 271(1)(c) of the Act. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who vide order dated 27.3.2001 (Annexure A-5) dismissed the appeal. Against the order, Annexure A-5, the assessee filed an appeal before the Tribunal. The Tribunal vide order dated 31.8.2004 (Annexure A-1) upheld the order of the CIT(A) and dismissed the appeal. Hence, the present appeals.

4. Learned counsel for the assessee-appellant submitted that the Tribunal had decided the cases of the assessee whereby the relief under Explanation 5 to Section 271(1)(c) of the Act has been denied by treating all the returns to have been filed under Section 139(4) of the Act whereas the return in the present case was filed under Section 139(1) of the Act. A distinction was sought to be made in respect of applicability of Explanation 5 to Section 271(1)(c) of the Act in respect of return filed under Section 139(1) of the Act and Section 139(4) of the Act. On that premises, it was submitted that the Tribunal had failed to grant benefit

under Explanation 5 to Section 271(1)(c) of the Act to the assessee and deleted the penalty levied under Section 271(1)(c) of the Act. Relying upon the judgment of the Apex Court in **Assistant Commissioner of Income Tax v. Gebilal Kanhaialal, HUF, (2012) 348 ITR 561 (SC)**, learned counsel contended that the assessee could deposit the tax along with interest at any time when no time limit for payment was fixed. It was urged that since the assets were seized by the revenue on 10.9.1993 at the time of search and the request having been made by the assessee for adjusting the same towards the tax liability, it could not be said that the tax was not paid on time.

5. On the other hand, learned counsel for the respondent-revenue supported the order passed by the Tribunal.

6. We have heard learned counsel for the parties.

7. It would be advantageous to quote below Explanation 5 to Section 271(1)(c) of the Act which at the relevant time existed as under:-

“Explanation 5: Where in the course of a search under section 132, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilizing (wholly or in part) his income,-

(a) For any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date or, where such return has been furnished before the

said date, such income has not been declared therein;

or

(b) for any previous year which is to end on or after the date of the search, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income, unless, -

(2) he, in the course of the search, makes a statement under sub-section (4) of section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in sub-section (1) of section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income.”

8. Explanation 5 to Section 271(1)(c) of the Act creates a deeming fiction. The Apex Court in **Gebilal Kanhaialal's case (supra)** while interpreting the aforesaid explanation had comprehensively laid down as under:-

“Explanation 5 is a deeming provision. It provides that where, in the course of search under Section 132, the assessee is found to be the owner of unaccounted assets and the assessee claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before the date of search or which is to end on or after the date of search, then, in such a situation, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed the particulars of his income for the purposes of imposition of penalty under Section 271(1)(c). The only exceptions to such a deeming provision or to such a presumption of concealment are given in sub-clauses (1) and (2) of Explanation 5. In this case, we are concerned with interpretation of clause (2) of Explanation 5, which has been quoted above. Three conditions have got to be satisfied by the assessee for claiming immunity from payment of penalty under clause (2) of Explanation 5 to Section 271(1)(c). The first condition was that the assessee must make a statement under Section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his

income, which has not been disclosed in the return of income to be furnished before expiry of time specified in Section 139(1). Such statement was made by the Karta during the search which concluded on August 1, 1987. It is not in dispute that condition No.1 was fulfilled. The second condition for availing of the immunity from penalty under Section 271(1)(c) was that the assessee should specify, in his statement under Section 132(4), the manner in which such income stood derived. Admittedly, the second condition, in the present case also stood satisfied. According to the Department, the assessee was not entitled to immunity under clause (2) as he did not satisfy the third condition for availing the benefit of waiver of penalty under Section 271(1)(c) as the assessee failed to file his return of income on 31st July, 1987 and pay tax thereon particularly when the assessee conceded on August 1, 1987 that there was concealment of income. The third condition under clause (2) was that the assessee had to pay the tax together with interest, if any, in respect of such undisclosed income. However, no time limit for payment of such tax stood prescribed under clause (2). The only requirement stipulated in the third condition was for the assessee to "pay tax together with interest". In the present case, the third condition

also stood fulfilled. The assessee has paid tax with interest upto the date of payment. The only condition which was required to be fulfilled for getting the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income upto the date of payment. Clause (2) did not prescribe the time limit within which the assessee should pay tax on income disclosed in the statement under Section 132 (4).”

9. The Supreme Court in the above noted pronouncement had held that the following circumstances are required to be fulfilled by the assessee to claim benefit under Clause (2) of Explanation 5 to Section 271(1)(c) of the Act and seek immunity therefrom:-

- (i) the assessee must make a statement under Section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in Section 139(1).
- (ii) that the assessee should specify, in his statement under Section 132(4), the manner in which such income stood derived.
- (iii) that the assessee had to pay the tax together

with interest, if any, in respect of such undisclosed income. However, no time limit for payment of such tax stood prescribed under clause (2). The only requirement stipulated in the third condition was for the assessee to "pay tax together with interest".

10. Delving into the controversy raised herein, it would be expedient to notice that the assessee filed his income tax return for the assessment year 1994-95 on 23.5.1994 declaring the income at ₹ 4,70,000/- inclusive of surrender under Section 132(4) of the Act. The Assessing Officer vide order dated 31.1.2000 (Annexure A-2) framed the assessment accepting the returned/surrendered income at ₹ 4,70,000/-. The Deputy Commissioner of Income Tax, Investigation Circle 2(1), vide order dated 27.7.2000 (Annexure A-4) levied penalty of ₹ 1,87,040/- under Section 271(1)(c) of the Act for the assessment year 1994-95 on the amount disclosed under Section 132(4) read with Explanation 5 to Section 271(1)(c) of the Act. The assessee filed an appeal before the CIT(A) which was dismissed. Thereafter, the assessee approached the Tribunal. The Tribunal vide order dated 31.8.2004 (Annexure A-1) upheld the orders of the Assessing Officer as well as the CIT(A) and dismissed the appeal. The Tribunal had only recorded that the income declared by the assessee would not provide the immunity to him from imposition of penalty under Section 271(1)(c) of the Act unless the conditions mentioned in the statement under Section 132(4) of the Act as well as the conditions laid down in clause (2) of Explanation 5, to Section 271 of the Act are fulfilled. It further recorded that the tax

authorities were fully justified that the assessee was not entitled to the immunity and imposition of penalty amounts. A perusal of the order of the Tribunal shows that the order passed by the Tribunal in the factual matrix involved herein requires to be re-adjudicated in the light of the interpretation given by the Apex Court in **Gebilal Kanhaialal's case (supra)** to clause (2) of Explanation 5 to Section 271(1)(c) of the Act as the Tribunal is the final fact finding authority who is required to deal with all aspects of facts and law before recording its conclusions based thereon.

11. Accordingly, the impugned orders are set aside and the matter is remanded to the Tribunal to decide the same afresh after hearing the parties and by passing a speaking order in accordance with law. Needless to say anything observed hereinbefore shall not be taken to be expression of opinion on the merits of the controversy.

January 18, 2016
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(AJAY KUMAR MITTAL)
JUDGE

(RAJ RAHUL GARG)
JUDGE